COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own Motion as to the propriety of the rates and Charges set forth in M.D.T.E. No. 17, filed With the Department on May 5, 2000 and June 14, 2000 to become effective October 2, 2000 by New England Telephone and Telegraph Company d/b/a Bell Atlantic – Massachusetts	)	**D.T.E. 98-57, Phase III**

COVAD'S REPLY COMMENTS
ON THE EFFECT OF THE FCC'S TRIENNIAL REVIEW ORDER

Covad Communications Company ("Covad") respectfully submits these reply comments in the above-referenced proceeding, in accordance with the Hearing Officer's September 2, 2003 Procedural Memorandum. Covad submits these reply comments to the Massachusetts Department of Telecommunications and Energy ("Department") to respond to the erroneous suggestions in Verizon's initial comments that the Department has no authority, consistent with the FCC's *Triennial Review Order*, to move forward with this case.

Contrary to Verizon's suggestions, it is clear that the FCC's *Triennial Review Order* has emphatically not preempted any state law or regulation governing competitor access to PARTS or the HFPL. Moreover, Massachusetts-specific conditions warrant that an order by the Department requiring the unbundling of Verizon's PARTS network architecture and the HFPL in the state of Massachusetts would not create a conflict with the FCC's national impairment analyses for hybrid fiber-copper loops and the HFPL. It

is further clear that Verizon is required to provide competitors with unbundled access to PARTS transmission capabilities and the HFPL as part of its RBOC obligations under section 271 of the Act.

I. Verizon Incorrectly Declares that the Department's Authority to Unbundle PARTS and HFPL Has Been Preempted by the Triennial Review Order.

a. Contrary to Verizon's Statements, the FCC has Stated Clearly That It Has not Preempted Any State Law or Regulation

Verizon erroneously states that FCC's *Triennial Review Order* has preempted the Department from conducting a case to unbundle PARTS and the HFPL under independent Massachusetts state law. In fact, as the language of the *Triennial Review Order* makes clear, the FCC has not acted to preempt any state law or regulation governing competitor interconnection and access to network elements.

At best, the FCC's *Triennial Review Order* lays out a framework for parties to petition the FCC to declare in *future proceedings* before the FCC that a specific state law or regulation unbundling network elements may or may not be preempted. Rather than concluding that a specific unbundling obligation under state law was preempted, the FCC created a process for parties to determine whether a "particular state unbundling obligation" requiring the unbundling of network elements not unbundled nationally by FCC rules creates a conflict with federal law. The FCC invited parties to seek declaratory rulings from the Commission regarding individual state obligations:

> Parties that believe that a particular state unbundling obligation is inconsistent with the limits of section 251(d)(3)(B) and (C) may seek a declaratory ruling from this Commission. [1]

[1] *Triennial Review Order* at para. 195.

An invitation to seek declaratory ruling, however, hardly amounts to preemption in itself – it merely creates a process for interested parties to establish in future proceedings before the FCC whether or not a particular state rule conflicts with federal law.

Thus, contrary to Verizon's baldly false statements, in the *Triennial Review Order*, the FCC quite clearly preempted nothing. It merely laid out a procedural framework for parties to establish in future proceedings before the FCC that a specific state law or rule governing competitor interconnection and access may or may not be preempted.

b. Contrary to Verizon's Suggestions, the FCC Has Not "Occupied the Field" of Unbundling Regulation.

A number of legal errors lie at the heart of Verizon's contention that the Department's authority to unbundle PARTS and the HFPL has been preempted by the FCC's *Triennial Review Order*. Specifically, Verizon erroneously asserts that the FCC "occupies the field" of unbundling regulation, "leaving no room for state commissions to independently decide the issue."[2] In fact, Verizon's characterization of the *Triennial Review Order* is exactly the opposite of the FCC's own statements in that order. In the *Triennial Review Order*, the FCC expressly disclaimed the ability to preempt the entire field of unbundling regulation, consistent with its past statements to the same effect. In the *Triennial Review Order*, the FCC stated:

> We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. *If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act*.[3]

[2] Verizon Initial Comments at 4.

[3] *See Triennial Review Order*, para. 192 (emphasis added).

In fact, the FCC has long recognized that the express terms of the Telecommunications Act of 1996 forbid the FCC from occupying the field of regulation of competitor interconnection and access to network elements. Specifically, the FCC has long recognized that section 251(d)(3) of the Act prevents the FCC from occupying the field of unbundling regulation,[4] and has long recognized that section 251(d)(3) is an "anti-field-preemption" provision.[5]

c. Contrary to Verizon's Suggestions, No Specific Delegation of Authority from the FCC is Required for the Department to Unbundle PARTS or HFPL under Massachusetts Law.

Verizon also erroneously suggests that a federal delegation of authority from the FCC would be required before the Department could proceed with a case determining whether to unbundle PARTS or the HFPL. Verizon states that the "FCC did not delegate to the states any role in determining whether broadband facilities should be unbundled," and expressly "limit[ed] the states' delegated authority to the specific areas and network elements identified" in the *Triennial Review Order*.[6] What Verizon fails to state, however, is that a federal delegation of authority would only be required for state determinations applying federal unbundling rules – namely, the framework the FCC

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[4] Section 251(d)(3) states:

> (3) Preservation of state access regulations.--In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--
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> (A) establishes access and interconnection obligations of local exchange carriers;
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> (B) is consistent with the requirements of this section; and
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> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C. § 251(d)(3).

[5] *See* Reply Brief of the Federal Communications Commission, *FCC v. Iowa Utilities Board*, 1998 WL 396961, at 18, n. 13 (Jun. 17, 1998).

[6] Verizon Initial Comments at 7.

created under federal rules for "local switching, dedicated transport and high capacity loops."[7] Verizon is incorrect, however, to the extent its misleading characterization suggests that a specific federal delegation of authority would be required for the Department to proceed with a case to unbundle PARTS and the HFPL under Massachusetts *state law.*

In fact, Verizon's misleading suggestion is directly contrary to the express language of the FCC in the *Triennial Review Order* itself. In the *Triennial Review Order*, the FCC made clear that its discussion of the role of states acting under authority delegated by the FCC was limited to the application of federal authority – not independent state law authority.[8] In a completely separate section, the FCC discussed the *separate* authority of the states to unbundle network elements acting under independent state law – for which no specific federal delegation of authority was required.[9]

d. The Triennial Review Order Made Clear that State Unbundling Regulations Are Not Preempted Simply Because They Add to the Federal List of UNEs.

Verizon also erroneously suggests that a mere inconsistency between the list of state UNEs under state law and the federal list of UNEs would create preemption.[10] In fact, the FCC stated very clearly the opposite:

> [T]he Eighth Circuit's opinion reinforces the language of [section 251(d)(3)], *i.e.*, that state interconnection and access regulations must "substantially prevent" the implementation of the federal regime to be precluded and that "*merely an*

[7] *Id.*

[8] *See Triennial Review Order* at paras. 187-190 (section entitled "Federal Authority and the Role of the States").

[9] *See Triennial Review Order* at paras. 191-196 (section entitled "State Authority").

[10] *See* Verizon Initial Comments at 7-8.

> *inconsistency"* between a state regulation and a Commission regulation was not sufficient for Commission preemption under section 251(d)(3).[11]

Thus, far from taking any specific action to preempt any state law or regulation governing competitor access to incumbent facilities, the FCC merely acted in the *Triennial Review Order* to restate the already-existing bounds on state action recognized under existing doctrines of conflict preemption. Furthermore, the FCC's *Triennial Review Order* recognized that "merely an inconsistency" between state rules providing for competitor access and federal unbundling rules would be insufficient to create such a conflict. Instead, consistent with existing doctrines of conflict preemption, the FCC recognized that the state laws would have to "substantially prevent implementation" of section 251 in order to create conflict preemption.

Indeed, the absurdity of Verizon's view of the Department's authority under independent state law is made clear by asking what authority, exactly, to enact state-specific unbundling laws and regulations is preserved in Verizon's view under section 251(d)(3). In fact, Verizon's view of the Department's authority to govern competitor interconnection and access would render section 251(d)(3) a nullity, never operating in any meaningful sense to preserve any state authority governing competitor interconnection and access separate from the FCC's authority under the Act. According to Verizon's view, the Department would be precluded from acting under state law, except where it acted to readopt verbatim the exact same list of UNEs established by the FCC under federal rules. Yet, in enacting section 251(d)(3), Congress could not have intended to render it a nullity.

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[11] *See Triennial Review Order*, para. 192 n. 611 (citing *Iowa Utils. Bd. v. FCC*, 120 F.3d at 806) (emphasis added).

e. The Triennial Review Order Made Clear that, in Some Circumstances, State-Specific Unbundling Regulations That Add to the Federal List of UNEs Will Not Be Preempted by the FCC.

Verizon erroneously states that the FCC completely precluded the ability of states to add to the federal list of UNEs established in the *Triennial Review Order*. In fact, the FCC stated merely that it was *"unlikely"* that the FCC would refrain from finding conflict preemption where future state rules required "unbundling of network elements for which the Commission has either found no impairment … or otherwise declined to require unbundling on a national basis."[12] The FCC's statement, however, that such future rules were merely *"unlikely"* – as opposed to simply unable – to withstand conflict preemption leads to the inevitable conclusion that there are some circumstances in which the FCC would find that such future rules were not preempted.

Thus, while the FCC's *Triennial Review* decision indicates that under some circumstances the FCC would find conflict preemption for state rules requiring the unbundling of network elements not unbundled nationally under federal law, the decision also indicates that in some circumstances the FCC would decline to find that such state rules substantially prevent implementation of section 251.[13] In fact, the FCC's decision gives some direction on the circumstances that would lead the FCC to decline a finding of conflict preemption for state rules unbundling network elements the FCC has declined to unbundle nationally. Specifically, in its discussion of state law authority to unbundle

[12] *See Triennial Review Order*, para. 195.

[13] Notably, the FCC's statements indicating when it is 'likely' to find preemption for particular state rules appear to conflict with a recent Sixth Circuit holding. The Sixth Circuit has stated that "as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted." The court further noted that a state commission is permitted to "enforce state law regulations, even where those regulations differ from the terms of the Act or an interconnection agreement" entered into pursuant to section 252 of the Act, "as long as the regulations do not interfere with the ability of new entrants to obtain services." *See Michigan Bell v. MCIMetro*, 2003 WL 909978, at 9 (6th Cir. 2003).

network elements, the FCC states that "the availability of certain network elements may vary between geographic regions."[14] Indeed, according to the FCC, such a granular "approach is required under *USTA.*"[15] Thus, if the requisite state-specific circumstances exist in a particular state, state rules unbundling network elements not required to be unbundled nationally are permissible in that state, and would not substantially prevent the implementation of section 251.

II. As Explained in Covad's Initial Comments, the Requisite Massachusetts-Specific Factors Exist to Warrant Unbundling PARTS and the HFPL in Massachusetts.

Verizon's primary case against the unbundling of PARTS and the HFPL consists simply of a recitation of the FCC's national impairment analysis for hybrid fiber-copper loops in the *Triennial Review Order.*[16] Verizon's recitation of the FCC's impairment analysis, however, is irrelevant – except to the extent it establishes the *national* factors relied on by the FCC in its national impairment analysis. Thus, at best, Verizon's recitation of the FCC's national impairment analysis serves as a useful backdrop against which to compare the conditions on the ground in Massachusetts, to determine whether or not the national factors relied on by the FCC are indeed present in Massachusetts.

a. Section 706 of the Act Confers the Same Authority to Spur Broadband Deployment on the Department As It Does the FCC.

Verizon makes much of the statutory goals of section 706, cited by the FCC in its national decision to refrain from unbundling hybrid fiber-copper loop facilities.[17]

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[14] *See Triennial Review Order*, para. 196.

[15] *See Triennial Review Order*, para. 196 (citing *USTA*, 290 F.3d at 427).

[16] *See* Verizon Initial Comments at 4-5.

[17] *See* Verizon Initial Comments at 6.

Critically, however, this statutory directive applies with equal force to the state commissions as it does to the FCC:

> The Commission and *each State commission with regulatory jurisdiction over telecommunications services* shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans….[18]

In other words, with respect to the goals of promoting advanced telecommunications deployment, Congress has conferred equal regulatory authority to the state commissions as it has to the FCC. Thus, the Department has just as much authority as the FCC to fulfill the goals of section 706 of promoting advanced telecommunications deployment. As discussed below, both of the FCC's stated goals of infrastructure deployment by incumbent LECs and by competitive LECs will not be thwarted by unbundling packetized broadband transmission capabilities in Massachusetts. Instead, due to the specific conditions on the ground in Massachusetts, both stated goals of section 706 will be furthered by the unbundling of PARTS and the HFPL in Massachusetts.

b. Access to PARTS Based Upon Massachusetts-Specific Facts.

As discussed in Covad's Initial Comments, the Department has already received voluminous record evidence demonstrating that Verizon will actually save money by deploying fiber-based networks in Massachusetts.[19] Verizon's deployment of a hybrid fiber-copper network has simply enhanced and continues to enhance the efficiency and cost-saving characteristics of its legacy loop plant.[20] Thus, there is little question that, regardless of any unbundling requirement, Verizon will deploy just as much fiber in Massachusetts as it would absent an unbundling requirement applying to the broadband

[18] *See* 47 U.S.C. nt 157.

[19] *See* Covad Initial Comments at 13.

[20] *See id.*

transmission capabilities of hybrid fiber-copper loops.[21] Furthermore, the Department has already stated it has "already designated existing UNE rates to reflect the risk ILECs face in providing wholesale services."[22] Thus, Verizon "should not object to unbundling" the broadband transmission capabilities of its PARTS facilities.[23]

Furthermore, there is little question that an unbundling requirement for PARTS will only enhance facilities-based investments by CLECs such as Covad in Massachusetts.[24] There is no commercially viable method of provisioning DSL through Verizon's remote terminals in Massachusetts, and Verizon refuses to admit that it has any obligation to facilitate such access. In Massachusetts, collocation at remote terminals is vastly more expensive than collocation at central offices due to the larger number of collocations and the diminishing access to customers per collocation arrangement. Under these cost constraints, there is little question that, in Massachusetts, far from using copper subloops to compete with Verizon's PARTS offering, competitors would simply refrain from competing for these primarily residential customers at all.[25]

Finally, as explained in Covad's initial comments, the alternative of TDM transmission facilities, such as a DS1 loop, are not true substitutes for packetized transmission facilities in Massachusetts. Enterprise high capacity loops such as a DS1 loop offer symmetric services and service level guarantees suitable to certain classes of business customers – not substitutes for Verizon's mass market broadband offerings.

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[21] *See id.*

[22] *See id.* at 14 (quoting Comments of the Massachusetts Department of Telecommunications and Energy, CC Docket Nos. 01-338, 96-98, 98-147, at 7).

[23] *See id.*

[24] *See* Covad Initial Comments at 15.

[25] *See id.*

Clearly, consumers and home-based businesses cannot afford (and do not need) the higher cost DS1 services.[26]

Thus, in Massachusetts, access to copper subloops and TDM transmission facilities does not alleviate competitors' need for access to the unbundled packetized transmission capabilities of hybrid fiber-copper loop facilities.

c. Access to HFPL Based Upon Massachusetts-Specific Facts.

As discussed in Covad's Initial Comments, the facts relied upon by the FCC in making a national finding of non-impairment with respect to the HFPL do not exist in Massachusetts. The primary and deciding factor relied upon by the FCC is the supposed ability of competitors to obtain revenues from all of the services the loop is capable of offering, including voice and data bundles using line splitting. In Massachusetts, however, Verizon has not made line splitting operationally available in the same manner as its own retail voice and data bundles.[27] For example, Verizon imposes customer impacting limitations on the timing of line splitting orders, and discriminatory OSS policies for submission of line splitting orders.[28] Verizon also recently unilaterally and arbitrarily determined that it would refuse to act on a change request to implement line splitting migrations – even though every requesting CLEC gave this change request a rating of 5 (reflecting the highest level of importance).[29] Verizon also continues to refuse to provision line splitting with resold voice service.[30]

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[26] *See id.* at 16.

[27] *See id.* at 17.

[28] *See id.*

[29] *See id.*

[30] *See id.*

Because of the operational and cost disadvantages competitive data providers continue to face in providing line split voice and data bundles in Massachusetts, competitors face severe competitive disadvantages in obtaining "all potential revenues derived from using the full functionality of the loop."[31] Accordingly, the assumption underlying the FCC's conclusion that competitors are not impaired without access to the HFPL does not comport with the facts as they exist in Massachusetts.

III. Notwithstanding Unbundling Obligations under Massachusetts State Law, Verizon Remains Subject to RBOC Obligations to Unbundle PARTS and HFPL under Section 271 of the Act.

In its Initial Comments,[32] Covad explains why, notwithstanding unbundling obligations imposed by the Department under Massachusetts state law, Verizon remains obligated as an RBOC to provide competitors with access to "local loop transmission from the central office to the customer's premises, *unbundled from local switching or other services*."[33] The language of this provision makes clear that it applies to all local loop transmission, regardless of technology or transmission medium used. Thus, it is clear that Verizon remains obligated to provide competitors with unbundled access to PARTS broadband transmission capabilities and HFPL transmission capabilities as part its RBOC Section 271 obligations.

As explained in Covad's Initial Comments, it is also clear that the Department has authority to enforce these federal statutory obligations. Specifically, the Massachusetts General Laws grant the Department broad authority to investigate service offerings in the context of proposed tariffs, and to hold public hearings upon notice of a proposed rate

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[31] *See id.* at 17-18 (quoting *Triennial Review Order* at para. 258).

[32] *See id.* at 18-24.

[33] *See* 47 U.S.C. § 271(c)(2)(B)(iv) (Section 271 checklist item#4).

change.[34] Courts have long held that where state enforcement activities do not impair federal regulatory interests, concurrent state enforcement activity is clearly authorized. Here, it would be absurd for Verizon to argue that the Department's action to enforce Verizon's federal statutory obligations could in any way "substantially prevent implementation" of any provision of the federal Telecommunications Act.[35]

In its Initial Comments, Verizon does not even attempt to dispute its obligations to offer unbundled access to PARTS and HFPL loop transmission as part of its RBOC Section 271 obligations under the Act. Thus, there is simply not question that the Act requires Verizon to provide non-discriminatory access to these forms of local loop transmission under section 271.

IV. The Department Clearly Has the Power and Authority to Save Voice and Data Competition; the Only Question is Whether the Department Will Do So.

As explained in Covad's Initial Comments, it has demonstrated beyond credible refutation that the Department has the statutory authority to grant competitors unbundled access to PARTS and the HFPL. Covad will demonstrate in this proceeding that Massachusetts-specific laws and Massachusetts-specific facts oblige this Department to require unbundled access to these elements, which are essential to the ability of competitors to provide Massachusetts consumers competitive data services. Covad looks

[34] *See* Covad Initial Comments at 19.

[35] *See id.* at 19-20.

forward to demonstrating to this Department that Massachusetts telecommunications consumers are entitled to, and deserve the benefits of this competition: better services and lower prices.

Respectfully submitted,

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October 14, 2003